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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1051

CULLEN HUCKABY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

JAMES EASLY,
521 Terminal Tower,
Cleveland, Ohio,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

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PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

Petitioner, Cullen Huckaby, prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit affirming the judgments of the District Court dismissing, without an evidentiary hearing, petitioner's motions for relief in the nature of a Writ of Error Coram Nobis.

OPINIONS.

The District Judge rendered unreported opinions in Criminal Action No. 41259 and Civil Action No. 32277,[1] which appear in Appendices A and B, respectively. The opinion of the Court of Appeals appears in Appendix C.

[1] Petitioner, who was not then in custody, filed a motion under the caption of the Criminal Action No. 41,259 for relief in the nature of a Writ of Error Coram Nobis. The District Court treated the motion as a proceeding to vacate sentence under 28 U.S.C., § 2255, and assigned Civil Action No. 32,277 to it. Petitioner, thereupon, filed a second motion for the same relief in the criminal action. An appeal was taken from the order denying relief in the civil action only to prevent a claim of res judicata being raised by the Government in the proceedings in the criminal case.

JURISDICTION.

The judgments of the Court of Appeals were entered on December 3, 1969 (Appendices D and E, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), 28 U.S.C. §1651, 28 U.S.C. § 2106 and Rule 35 of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

1. Whether the failure of the Government to disclose to petitioner evidence exculpatory of him and which, if it had been disclosed, would have exonerated him, deprived petitioner of due process under the Fifth Amendment to the Constitution of the United States.

2. Whether the Trial Court must hear a motion for relief in the nature of a Writ of Error Coram Nobis filed by petitioner for the purpose of vacating a judgment of conviction rendered by the same court where it is alleged in the motion that the Government failed to disclose to petitioner evidence exculpatory of him, thereby depriving him of due process under the Fifth Amendment to the Constitution of the United States and said exculpatory evidence and whether the same was disclosed to petitioner cannot be deduced from the record.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Rule 35 of the Federal Rules of Criminal Procedure (Appendix F, *infra*) and the due process clause of the Fifth Amendment to the Constitution of the United States of America (Appendix C, *infra*) are involved.

STATEMENT.

Petitioner was convicted on his plea of not guilty by a jury of the offense of possession of a still, mash and distilled spirits and working in a distillery in violation of 26 U.S.C., § 5179(a)(1), 5205(a)(2), 5222(a)(1), 5601(a)(1)(7), 5604(a)(1) and 5681(c). The Court of Appeals affirmed the conviction in an unpublished order.

Petitioner's motion for a new trial on the grounds of newly discovered evidence, after an evidentiary hearing, was denied by the District Judge who disregarded the uncontroverted and incontrovertible evidence of the United States Weather Bureau and facts of the Science of Chemistry. Petitioner's appeal from such denial was dismissed by the Court of Appeals as frivolous and entirely without merit. *United States v. Huckaby*, 400 F.2d 576, cert. denied, 393 U.S. 933, rehearing denied, 393 U.S. 1046.

Petitioner's verified motion and the affidavit of Samuel M. London incorporated by reference therein allege that:

Samuel M. London was arrested on November 10, 1964, released on bail on the same day and indicted with petitioner on December 15, 1964;

On February 21, 1966, he pleaded guilty to one count of the indictment, the other two counts being held in abeyance;

On April 7, 1966, petitioner was found guilty and his motion for a new trial was denied on May 12, 1966;

On May 13, 1966, Samuel M. London was put on probation for a period of two years;

After his release on bail on November 10, 1964, Samuel M. London was questioned by a Government agent on several occasions. At the first meeting with the agent

and at two or three meetings thereafter, Samuel M. London informed the agent that petitioner had nothing to do with the still and knew nothing about it.

When he was first questioned by a probation officer, Samuel M. London made the same statement to him.

The Government failed to disclose to petitioner the exculpatory evidence revealed to it by Samuel M. London, and, that, if the same had been disclosed, the jury would have acquitted petitioner who is not guilty.

Samuel M. London first informed petitioner on January 24, 1969, that he had made said exculpatory statements to a Government agent and that he had been deterred from informing petitioner at an earlier time because of apprehension of incurring the enmity of the agents and revocation of his probation.

Petitioner, thereafter, on February 13, 1969, filed a motion in the nature of a Writ of Error Coram Nobis to vacate the judgment of conviction, which the District Judge summarily denied on February 20, 1969, without affording petitioner a hearing and an opportunity of presenting evidence for the record.

On April 16, 1969, petitioner surrendered to the United States Marshal and commenced serving the sentence imposed on him.

REASONS FOR GRANTING THE WRIT.

1. The failure of the Government to disclose to petitioner evidence exculpatory of him and which, if disclosed, would have exonerated him, deprived petitioner of due process under the Fifth Amendment to the Constitution of the United States.

The Government is under a duty to disclose to a defendant any favorable evidence which is communicated to it and the failure to do so is a denial of due process.

Mooney v. Holohan (1935), 294 U.S. 103;
Brady v. State of Maryland (1963), 373 U.S. 83;
Giles v. State of Maryland (1967), 386 U.S. 66.

2. The Trial Court must hear a motion in the nature of a Writ of Error Coram Nobis filed by petitioner for the purpose of vacating a judgment of conviction rendered by the same court when it is alleged that the Government failed to disclose to petitioner evidence exculpatory of him, thereby depriving him of due process under the Fifth Amendment to the Constitution of the United States and such evidence and whether it was disclosed to petitioner cannot be deduced from the record.

The District Judge must hold a hearing of the motion when the question cannot be deduced from the record and there has been a violation of the defendant's constitutional rights. *U. S. v. Morgan* (1953), 346 U.S. 502.

Substantial questions of fact bearing directly upon petitioner's constitutional rights were presented to the Trial Judge who denied petitioner's motion, without a hearing thereby depriving him of an opportunity of bringing into the record the facts, which would establish his right to have the judgment of conviction vacated.

By his order, the Trial Judge has closed the door for petitioner to obtain relief. The ultimate question involved

in the appeal and in this petition is whether or not petitioner was entitled to a hearing and the opportunity to bring the facts into the record.

It is submitted that, on law and in justice, petitioner is entitled to a hearing.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

JAMES EASLY,
Counsel for Petitioner.

APPENDIX A.

ORDER DENYING MOTION TO VACATE.

(Criminal Action No. 41,259.)

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on February 20, 1969.

Present: The Honorable Talbot Smith
United States District Judge

On February 14, 1969, this Court ruled that Petitioner's Motion to Vacate Judgment, Civil Action #32277, was without merit and the Motion was denied.

On February 13, 1969, Petitioner filed a second Motion to Vacate Judgment, which was given Criminal Action number 41259, raising substantially the same allegations in an almost identical form as were raised in Civil Action 32277. These allegations have been carefully considered and are rejected. Petitioner is merely restating arguments which have been used before in his Motion for a New Trial and on his Appeals.[1] Any new matters raised are without substance.

Defendant also filed a Motion for Admission to Bail pending determination of his Motion to Vacate Judgment.

Since the Motions to Vacate Judgment (Civil Action 32277 and Criminal Action 41259) have now been considered and denied, the Motion for Admission to Bail is thereby moot and is denied for that reason.

Defendant's Motions to Vacate Judgment and for Admission to Bail are denied.

It is so ordered.

TALBOT SMITH,
United States District Judge.

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[1] It should be noted that Petitioner appealed his conviction to the Sixth Circuit which appeal was denied on July 15, 1968. Following this denial, the Petitioner, alleging newly discovered evidence, appealed the denial of his Motion for a New Trial. This appeal was also denied as "frivolous and entirely without merit" on September 17, 1968. Petitioner has not yet begun to serve his sentence and has only recently been ordered to report to the proper authorities so that his sentence might begin.

APPENDIX B.

ORDER.

(Civil Action No. 32,277.)

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on February 14, 1969.

Present: The Honorable Talbot Smith
United States District Judge

Petitioner, Cullen Huckaby, was tried before a jury and convicted on April 7, 1966, of violation of the laws relating to distilled spirits. He was sentenced on May 26, 1966 but has not begun to serve his sentence to date. The petitioner filed a motion for a new trial based on "newly discovered evidence." This motion was heard on March 4th and denied on March 18, 1968.

The Petitioner filed two appeals. Petitioner's appeal from his conviction was denied by the Court of Appeals for the Sixth Circuit on July 15, 1968. Petitioner then filed a separate appeal from the order denying his motion for a new trial, which was denied on September 17, 1968. This appeal was dismissed by the Court of Appeals as "frivolous and entirely without merit."

Petitioner now files a motion to vacate judgment of conviction under Title 28, Sec. 1651 seeking "an order in the nature of a Writ of Error Coram Nobis."

This matter has been thoroughly reviewed by the trial court as well as the Court of Appeals. The petitioner raises no matters of any substance which would merit further review of his claims. The Motion is completely without merit and is denied.

It is so ordered.

TALBOT SMITH,
United States District Judge.

APPENDIX C.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided December 3, 1969.)

Before PHILLIPS, Chief Judge, and EDWARDS and CELEBREZZE, Circuit Judges.

PER CURIAM. On July 19, 1968, this Court in an unpublished order affirmed the conviction of appellant, Huckaby, for the offense of possession of a still, mash and distilled spirits and working in a distillery in violation of 26 U.S.C. §§ 5179(a)(1), 5205(a)(2), 5222(a)(1), 5601(a)(1), 5601(a)(7), 5604(a)(1) and 5681(c). Thereafter this Court dismissed a second appeal as frivolous and entirely without merit. *United States v. Huckaby,* 400 F.2d 576, cert. denied, 393 U.S. 933, rehearing denied, 393 U.S. 1046.

The two appeals in the present cases, which were consolidated for briefing and oral argument, are from the dismissal by the District Court of a "motion for relief in the nature of a writ of error coram nobis" and a proceeding which was treated by the District Court as a motion to vacate sentence under 28 U.S.C. § 2255. Appellant complains that he was denied relief without an evidentiary hearing. The record discloses that the District Court previously had accorded appellant two evidentiary hearings, first on his original jury trial and a second on his motion for a new trial on grounds of newly discovered evidence.

Upon consideration, the Court concludes that both of the present appeals are without merit.

Affirmed.

APPENDIX D.

ORDER AFFIRMING DISTRICT COURT (NO. 19419).

(Entered December 3, 1969.)

This cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On consideration whereof,

It is now ordered and adjudged by this Court that the judgment of the said District Court in this be and the same is hereby affirmed.

Entered by the order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX E.

ORDER AFFIRMING DISTRICT COURT (NO. 19443).

(Entered December 3, 1969.)

This cause came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

On consideration whereof,

It is now ordered and adjudged by this Court that the judgment of the said District Court in this be and the same is hereby affirmed.

Entered by the order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX F.

FEDERAL RULES OF CRIMINAL PROCEDURE RULE 35.

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law. As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX G.

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

Fifth Amendment—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1051

CULLEN HUCKABY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted and sentenced on four counts charging unlawful possession of a still, the possession and fermentation of mash, unlawful possession of distilled spirits, and working in an unregistered distillery. While his appeal was pending, he filed in the district court a motion for a new trial on the ground of newly discovered evidence. Following a hearing, the district judge denied the motion, finding

the testimony concerning alleged wiretapping "fantastic". The court of appeals thereafter entered orders affirming both the conviction and the denial of the motion for a new trial, 400 F. 2d 576. Petitions for writs of certiorari were denied by this court, 393 U.S. 933, 938.

In the instant proceeding for post-conviction relief, petitioner claimed that the government had knowingly suppressed evidence favorable to him in that a co-defendant who pleaded guilty allegedly had told government agents that petitioner "had nothing to do with the still." The district court denied the motion, and the court of appeals affirmed. These rulings were fully justified and do not warrant further review. Unlike *Giles* v. *Maryland*, 386 U.S. 66, on which petitioner relies, the allegedly suppressed information did not relate to any evidence produced at trial, since the co-defendant did not testify. The alleged statement of the co-defendant was not admissible evidence for or against petitioner. Cf. *Brady* v. *Maryland*, 373 U.S. 83 (unconstitutional suppression of a co-defendant's confession which would have been inadmissible at trial on the question of the petitioner's guilt did not require a new trial.)

In addition, the circumstances of this case cannot support any inference of prejudice to petitioner, who was of course well aware before trial of his co-defendant's existence. Petitioner knew whether he himself was guilty of the charges and knew, if his co-defendant were to testify, truthfully, at trial, what that testimony would be. If petitioner in fact believed that the co-defendant would give truthful tes-

timony exculpating him, the government's failure to come forward and advise petitioner of the co-defendant's alleged statements could not have affected the petitioner's incentive to secure the co-defendant's testimony. If petitioner in fact knew that the co-defendant's testimony would incriminate him, the government's failure to disclose the co-defendant's apparently untruthful statement deprived petitioner of no legitimate interest.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1970.

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